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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 13.

UNITED GAS PUBLIC SERVICE COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLANT'S SUPPLEMENTAL BRIEF.

JOHN P. BULLINGTON,
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Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellant's petition to the city of Laredo for increase in the 75 cent rate was dated June 27 and filed June 29, 1932 (R. 10-11, 1353), and not prior to January 1, 1932, as stated on page 68 of appellant's brief. See appellees' brief, p. 112. On page 36 of appellant's brief, the heading over the column of figures should read "Year ended December 31, 1933."

The appellees, in their brief,[1] have not responded to the errors assigned[2] separately or by any other appropriate

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[1] Appellees' brief was served on appellant in Houston, Texas on October 7, 1937, the case being set for submission the week of October, 11.

[2] The Assignment of Errors in appellant's petition for appeal contains thirteen paragraphs (R. 510-513), all of which were stated

grouping. They do not deny that, tested by the Railroad Commission's findings of property value and depreciation allowance and only the testimony of operations showing the highest rate of return, the enforcement of the 55 cent rate would leave appellant net return of 1-1/10 per cent for 1932 and of 2-1/10 per cent for 1933. See appellant's brief, Argument I, pp. 32-34. Appellees do not deny that the finding of the Court of Civil Appeals as to net return for 1933 under the 55 cent rate is wholly unsupported by evidence, or that appellant's statements with respect to the testimony upon which its calculations are made correctly reflect what the record shows. Appellant's brief, Argument II, pp. 35-37. Nor is there any such denial as to appellant's calculations of net return for 1932 and 1933 under the 75 cent rate (appellant's brief, Argument VIII, p. 68), or as to the mathematical accuracy of any of the net returns shown. There is no dispute that the record shows what appellant says it shows either in respect to the Commission's findings of fair value, depreciation allowance, return, 1932 or 1933 revenues with domestic gas computed at the 55 cent rate, or the lowest figures for operating expenses shown by the testimony.

Appellees' complaint is that these net returns are not computed as appellees think they should be, in that certain assumptions contrary to the facts are not made, in that annual operating figures instead of averages are used, and in that certain deductions were or should be made. See appellees' brief, Summary of Argument, XX, pp. 28-30. For the rest, appellees claim that the state courts reviewed and analyzed all testimony, but simply failed to make the record show this review and analysis (appellees' brief, pp.

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as the points upon which it intended to rely (R. 1407-1410). Appellant's brief specifies all but one of these paragraphs as assigned errors (Specification of Errors pp. 23-27) and presents argument thereon under nine points or headings. Appellant's brief, I-IX, pp. 32-79.

18-19, 21-22); that refunds leaving net returns of about 1 and 2 per cent respectively for 1932 and 1933 are immaterial, because these returns can be made to appear adequate by averaging in "fat years", (brief, pp. 27-28, 63-65); that the Court of Civil Appeals correctly decided confiscation by using the lowest valuation figure in the record and the average revenue figures for the four prior years July 28, 1928—July, 1932, (brief, pp. 25-29); and that increased sales are probable under the 55 cent rate, (brief, pp. 23-24, 53-63).

The major portion of the appellees' Argument (appellees' brief, pp. 67-111), is given over to details of the testimony with respect to fair value, operating revenues and expenses, depreciation reserve accrual and rate of return, just as though the case were before the Railroad Commission, with the testimony completed but no findings yet made. To support this argument, appellees have diligently collected from the testimony before the Commission as well as at the trial below, features which are asserted to reflect discredit upon appellant. These portions of the testimony are termed "principal fallacies in the Company's evidence" (appellees' brief, p. 111), and their cumulative effect is said to make this entire record so unreliable that it cannot convincingly show denial of due process and equal protection.

The appellees' theory is that while the Railroad Commission may reduce rates without anything but lump-sum findings of over-all value, depreciation allowance, net return, etc., and while the state courts need make or require no fact findings at all, the gleanings from all the testimony before these tribunals may be cumulated, presented in their most unfavorable light, and accepted by this Court as appellant's failure to show infringement of its constitutional rights.

Appellant has brought up that part of the record which it's counsel thought necessary for consideration of the errors it assigned in respect to the judgment of the state ap-

pellate court from which the appeal was taken. If it should have been prepared to meet an attack based on the weight of testimony as to proceedings by or before the City Council, whose 40 cent rate ordinance was set aside, or on the weight of testimony before the Commission, which has made its ultimate findings, or on the mere weight of any other testimony or on the credibility of the witness who gave it, then appellant has misconceived the scope of the appellate review in this Court.

It is in respect to one assignment only, i.e., its assignment on the failure of the state courts to consider and pass upon its claim of confiscation arising from the Commission's undervaluation of its property, that appellant attempts to summarize the proof. Appellant's brief, Argument, III, p. 37-47. There the summary is not for the purpose of having this Court pass upon the weight of the testimony and credibility of witnesses, but to show that appellant's claim of undervaluation was supported by competent proof sufficiently substantial so that it could not be said that such proof could not conceivably establish that the Commission's valuation was unreasonable. *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405, 415-416; *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165, 171. The remainder of the assignments are based upon points of law, or upon a combination of legislative findings and proof, which proof is indisputable by appellees on this record, because it was either given by appellees themselves, or because they did not refute it at the trial.

Being uncertain as to the extent to which assertions by appellees, made upon their theory of this appeal, might be taken as undisputed and applied in respect to the assigned errors upon which appellant relies, appellant will attempt to point out the respects in which certain of these assertions are unfounded. No attempt is made to correct every misstatement which appears in appellees' brief.

MISSTATEMENTS OR UNSUPPORTED CONCLUSIONS IN APPELLEES' BRIEF.

Under XX, p. 29, appellees' brief, the statement is made that revenues received from Central Power and Light Co. and Motor Fuel Products Co. in the calendar years 1932 and 1933 were deducted in computing returns for those years. This is not true. See testimony of Womack (R. 97, 99), where he says that in showing 1932 and 1933 operating revenues at the 55 cent rate, only gas billed at 75 cent rate was recomputed, and the actual revenues received from other customers in those years were included. See defendant's exhibit 1 (R. 69), showing that total operating revenues of $183,777.41 for the calendar year 1932 included $8,790.20 for public utility fuel sales; also defendant's exhibit 5 (R. 88C), showing this $8,790.20 as non-recurring revenue for 1932, and see Womack's testimony (R. 95-96), showing that calculations of return at the 75 cent rate were based upon gross operating revenues of $183,777.41. Revenues from these two sources in 1933 totaled $54.40. See defendant's exhibit 3, public utility for fuel sales, $54.40 (R. 79; also 88C). As to the remainder of asserted "erroneous bases of calculation" (appellees' brief, pp. 28-29), appellant indulged in no assumptions, no averages were made, and appellant used only the evidence showing the highest rate of return in every calculation in its brief, pp. 34, 36-37, 54, 68. These years were completed transactions, and in showing the result of enforcing the 55 cent rate, appellant applied the Railroad Commission's order as written (R. 26), and showed revenues as they would be after domestic sales in these years were figured at the 55 cent rate, and the difference refunded. The net return of 7 per cent found reasonable by the Commission (R. 25) was not used as the line of confiscation. It was used as a standard by which to compare the returns of about 1 per cent for 1932 and about 2 per cent for 1933 which enforcement of the 55 cent rate would actually leave.

In the first paragraph under Points VIII, IX and X, appellees' brief, pp. 47-48, appellees assert that the Commission, in finding fair value of $885,000, made detailed findings as to preliminary and organization expense, administrative and legal expense, engineering, interest and taxes during construction, fair value of gathering system, transmission system and distribution system property, reproduction cost new of entire plant, and that the Commission included the Jenning field pipe line and gathering system in the $885,000 at $135,000. Neither the Commission's opinion nor any other testimony shows that these alleged findings were made or what they are, and appellees' statement is based on a source of information outside this record. See Commission's opinion (R. 13-25), and compare this opinion with footnote 62, appellant's brief, p. 75.

On pp. 18-19, and again on pp. 21 (last paragraph), 22 and 44-47, of their brief, appellees assert that the District Court, the Texas Court of Civil Appeals, as well as it's Supreme Court, carefully reviewed and analyzed all the testimony in the record and thereby accorded appellant the exercise of independent judicial judgment on the facts. Appellees assert that this review and analysis constituted mental processes and reasoning of these courts which do not appear, nor are they required to be shown, in the record. Here again appellees' assertion, if true, is based on a source of information unknown to appellant and outside the record. The Supreme Court of Texas wrote no opinion (R. 474, 479) and the decision of the Court of Civil Appeals, as disclosed in its opinion, was upon the theory that the appellate court, in deciding confiscation claimed in respect to a new rate that had not been charged, must determine that question by paring down valuations to the lowest valuation shown by the evidence (R. 421, 422, 425) and must resolve all doubts against appellant by using only appellees' testimony of operations (R. 425). The Court of Civil Appeals did not say it had reviewed and analyzed the proof, and all it said and did in deciding the case forbids

any such conclusion. The requirement is that an independent judgment be exercised in respect to the facts. The means known to the law for disclosing the exercise of such judgment are analysis and findings. A court opinion is designed to reveal the essential bases upon which a case is decided. The only opinion showing the action of the state courts refutes appellees' contentions, and overrides their claim of superior information derived from sources outside the record.

Under their XIII and XXVI, appellees' brief, pp. 62-63, appellees point out that the block map showing the city of Laredo and appellant's distribution gas mains reveals that appellant has not extended its mains so as to adequately serve the city's inhabitants. See map (R. 1404). The inference is that all the subdivided area within the city limits is inhabited. This is untrue. Not over one-half of this area is inhabited, nor has it municipal, utility or other improvements. The claim is also made (appellees' brief, p. 60) that appellant does not wish as customers the humble Mexicans that Mayor Martin believed would take gas service at a lower rate. This is a half-truth. Strange, appellant's vice-president, testified that appellant desired all customers (R. 345), but that, as the type of population described by Martin (using one or two gas jets for light, a hot-plate for cooking and a small stove for space-heating) would constitute a burden because of the additional investment and operating costs entailed in comparison to the very small revenue to be derived, they were not desired (R. 345). There are also the wholly unsupported claims that appellant has arbitrarily raised its prices to Laredo industrial customers, particularly the electric company, and that its sales of gas at the State border for delivery and resale in Nuevo Laredo and Monterey, Mexico, are discriminatory and constitute "dumping." Appellees' brief, pp. 55-57. The electric company's managing official, Neiswanger, was a witness at the trial, and the claim which appellees now make could have been verified then and there, but was

not (R. 104-109; 543-544). The prices at the Mexican border were prices for gas to be transported and then distributed and sold. All testimony of this character went into the record over appellant's repeated objection that conditions were not shown to be like and comparable (R. 612, 613, 614, 616, 617, 627, 636). Appellees' argument amounts to the contention that in order to avoid a showing of confiscation, they have only to get into the record the wholesale price at which gas is delivered at another point, and thereby put upon appellant the burden of showing that no inference of discrimination could be drawn from the mere comparison of prices. It is needless to point out the factors to be considered in determining discrimination are numerous, sometimes intricate, and the final conclusion is always a matter of degree and sound judgment. Appellees' claim of excess line capacity for Laredo is in the same category, except that appellant introduced proof showing no such excess, even under the load conditions existing in 1932 and 1933. This proof is undisputed, and neither appellees' witnesses nor any of the Commission staff attempted to refute it (R. 348-349).

Appellees say "any school boy would recognize" that the difference between annual deliveries ended June, 1930 and for the calendar year 1933 would mean excess capacity. Appellees' brief, p. 61. The Railroad Commissioners know that gas pipe line capacity depends, not upon comparison of annual deliveries, but upon the coincident hourly peak demands which the line is called upon to handle, the divergency factor, the well pressures, and a number of other facts. One high pressure well cannot be used to boost up pressure jointly with low-pressure wells, as the high-pressure well will stop flow from all others, take the entire flow of the line, and void the sand area around the bottom of the well-casing so as to permit water to trap off the gas and ruin the well.

Appellees' attempt to answer appellant's assigned errors by argument upon the many subsidiary issues entering into fair value, rates of return and depreciation reserve accrual, and operating results is not only improper and unfair upon this diminished record, but is a belated recognition of the complete failure of the state courts to perform their duty in this respect. Because of the collateral character of this argument (appellees' brief, pp. 67-110) only the most important misstatements will be noticed.

Appellees say in their brief, pp. 75-79, that when appellant took over the property and assets of its subsidiary South Texas Gas Company in October, 1932, the voucher recording this transaction increased capital account in the net amount of only $934,798.02 to record the acquisition of the properties and assumption of liabilities (R. 242). This is true. Appellees say that the South Texas Company had previously acquired the properties of Texas Border Gas Company, which owned the Laredo distribution properties (R. 242), and that South Texas likewise owned the pipeline from the Jennings field to the State border at Roma, and that this Jennings-Roma line cost $800,000 or $900,000 when built in 1929 (R. 243). This is also true. Appellees then argue that this voucher constitutes an admission by appellant that the Jennings-Roma line, the pipe lines from Carolina-Texas and Jennings field to Laredo, and the distribution properties inside and outside of Laredo, were worth only $934,798.02 as of October 21, 1932. This is an unwarranted inference, conclusively negatived by the record. Appellant held the common stock of South Texas Gas Company, which was cancelled (R. 370), and it assumed all liabilities, including one issue of mortgage bonds of over $3,000,000 (R. 285). The total assets involved in this transaction were over $10,000,000.00 (R. 372). Plant and property account was $2,788,651.24 (R. 371). Appellees ignore that this voucher was not only to record acquisition of properties, but also the assumption of liabilities, and $934,798.02 was the net increase in appellant's assets after the acquisition and assumption.

As to the line to the Jennings field, appellees in their brief claim that appellant did not intimate before the Commission that the Jennings line was to be repaired (pp. 69-71), that its use in 1932 depended solely on the memory of Abernathy (pp. 68-69) and that reconditioning involved replacing practically the entire line (p. 68). At the Commission hearing, Greene told of the plans then being made to recondition the line for continuous future service (R. 229); the March 1932 blow-up in the Carolina-Texas line and the use of the Jennings line to continue service were covered by Greene (R. 157-158, 228-229) and Abernathy (R. 229-231). The line was 30 miles, or about 158,000 feet long, and the 1933 reconditioning involved replacement of 11,000 feet of pipe (R. 704). Hargrove is quoted as saying that this was the first repair job of any importance on the line since 1916 (p. 71) whereas he said this was the first such job since he came with appellant's predecessor in 1928 (R. 1103). Ivy, appellant's geologist, is quoted as saying that there was much "undeveloped gas reserve territory in the immediate vicinity" (p. 73), but what he said was that there was still a "whole lot of territory down there in that country that has not been explored yet" (R. 1099).

As to operating expenses, appellees' final claim is that, even though their accountant Lewis included all operating accounts except pipe line rentals and the 1 cent gathering charge in the Carolina-Texas field in the operating statements sponsored and introduced in evidence by appellees (their brief, p. 107), this Court should now undo what they have done, and strike out on appeal items of expense which the appellees did not eliminate in the trial court, where such action would have been subject to cross-examination and rebuttal proof. And in spite of the fact that appellant supported this gathering charge by proof of the required kind, which proof was never disputed (R. 113-121, 129-139), appellant has nevertheless used appellees own accounting figures in showing confiscation for 1933 (appellant's brief, pp. 34, 36, 68), and has used its own accounting testimony

only when that was the only proof which the record showed.

Appellees repeatedly charge appellant with attempting to withhold facts because it contended that since the testimony as to property value was at 1932 depression prices (R. 197), the operating results upon which the Commission made its determination should likewise be those as of the date of the inquiry, and because appellant contended that it was improper to base the 55 cent rate on the four year average revenues commencing July 1928 and reflecting pre-depression economic and wholly different operating conditions as compared to 1932 and 1933. But near the end of the brief (pp. 108-110), appellees claim estoppel against appellant for not making the proof before the Commission with respect to the obsolete nature of the Central Company's Laredo electric generating plant and the improvident investment in the Motor Fuel Products refinery, so as to show the Commission the permanently non-recurring character of these revenues. The precipitate downward trend of these revenues was apparent to any one looking at the city's testimony (R. 218). Moreover, the city insisted on introducing annual operating statements going clear back to January 1, 1911 (R. 1378-1378A), and the Commission did not reveal what operating figures out of this twenty-two years would be used until the Commission's order was entered without notice on June 13, 1933 (R. 26, 33). If the Commission had permitted appellant to examine the order and file exceptions (R. 235), as it did not, there might be some substance to this complaint.

In conclusion, it is submitted that appellees' claims with respect to the testimony relate only to matters winnowed out of the issues in the course of this appeal and have no bearing on the only issues before this court.

Respectfully submitted,

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ON REARGUMENT
APPELLANT'S SUPPLEMENTAL BRIEF

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The Court's questions at the first argument were directed largely to the nature of the State procedure and its application in this case. The order for reargument states the Court's desire to hear the parties especially on the application of the Commission's rate for 1932 and 1933 and as to the effect on appellant's rights, with respect to those years, of the bond given when the appeal to the Commission was taken. The purpose of this brief is to supplement appellant's main brief in regard to these matters.

The State Legislative Procedure.[1]

The power to fix in the first instance the gas rates charged in Laredo is delegated to its city governing body.[2] The original and exclusive power to fix rates and charges by natural gas pipe lines is delegated to the Railroad Commission of Texas.[3] When a municipality has reduced an existing gas rate, the gas company may have such action reviewed by the Railroad Commission by filing a petition and bond with the Commission upon such terms and conditions as it may direct.[4] This proceeding is called an appeal, and the Commission is required to hear the matter *de novo* and to make such order or decision as it may deem just and reasonable.[5] No other statutory standards are prescribed for the Commission in deciding such appeals.[6]

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[1]See appellant's main brief. "Proceedings Before the Railroad Commission," pp. 2-5, and appendix pp. 81-84.

[2]Laredo is a Home Rule city (R. 411), and is controlled by Section 12, Article 1175, Revised Civil Statutes of Texas, 1925, a recodification of Acts, Tex. Legis., 1913, pp. 307, 311; quoted in appellant's main brief, p. 81.

[3]Art. 6053, Rev. Civ. Stats. of Tex. 1925, a recodification of Acts, Tex. Legis., 3rd Called Session, 1920, Sec. 3, pp. 18-19.

[4]Art. 6058, Rev. Civ. Stats. of Tex., 1925, a recodification of Acts, Tex. Legis., 3rd Called Session, 1920, Sec. 6, p. 21; quoted in appellant's main brief, pp. 82-83.

[5]Art. 6058, *supra*.

[6]Harris v. Municipal Gas Co. (1933), not officially reported, 59 S. W. (2d) 355, 357, holding that the last sentence of Art. 6058—which provides for determination of the appeal by the Commission in 60 days and that the rates fixed by the municipality shall remain in force pending the Commission's decision—applies only to appeals from the municipality's denial of an application for increase in an existing rate. The Commission treats the 60-day provision as directory, not mandatory.

This proceeding reached the Commission as an appeal by Texas Border Gas Company (Art. 6058) from an ordinance providing for a reduction of the domestic gas rate in Laredo from 75 cents to 40 cents per 1000 cubic feet. The Commission ordered the ordinance suspended and the 75 cent rate continued in effect pending the appeal upon the company filing a bond for refunds. The hearing before the Commission, however, was upon testimony which, in effect, began with the gas at the bottom of the wells and extended to the consumers' burner tips, which showed separately the property value, revenues, operating expenses and other factors for service in Laredo only, and which made United Gas Public Service Company responsible for complying with the Commission's rate order of June 13, 1933, now before this Court. The way in which this came about is set out in footnote 7 below.

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[7]Prior to January 1, 1932, Texas Border Gas Company appealed to the Commission from the Laredo 40 cent rate ordinance (R. 7-9). See appellant's main brief, p. 3, and footnote 3. The Commission ordered the ordinance suspended (which continued the existing 75 cent rate in effect) and Texas Border Gas Company filed a refund bond in the amount and conditioned as required by the Commission (R. 10). About July, 1932, the same company perfected a second appeal (likewise under Article 6058) from the failure of the City to increase the existing domestic rate (R. 10, 11).

Appellant, about June, 1930 (R. 645, 885), had acquired control of Texas Border Gas Company, which owned the gas distribution properties in and adjacent to Laredo, and of South Texas Gas Company, which owned the field gathering and transmission properties used to bring the gas to the City. This control was obtained from the Moody-Seagraves interests (R. 603, 885), which interests in 1928 had formed these two subsidiary corporations and divided the ownership of the properties between them (R. 12). After acquiring these and other natural gas companies, appellant began dissolving unnecessary corporations, taking over their assets, assuming their liabilities and operating their

Thus both the appellate and original jurisdiction of the Commission were involved. The gathering, transmission and distribution properties were treated as one combined property. (R. 12.) This treatment, in so far as it ignored the former ownership of the properties by two subsidiaries, was in keeping with the testimony. For example, the former contract between Texas Border Gas Company and South Texas Gas Company fixing the price for gas delivered at the Laredo city gate, though mentioned by the Commission (R. 12), was not even

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7—*Continued*—

properties, includng those of Texas Border Gas Company and South Texas Gas Company (R. 222-224; 11; 75-78). South Texas Gas Company was made a party to both appeals and answered therein. All proceedings were consolidated for hearing (R. 11), which commenced October 4, 1932 (R. 9). The parties stipulated that a fair and reasonable field price of gas for Laredo was 5 cents per 1000 cubic feet at the wells (R. 11, 66). This stipulation was made so as to permit the gas for Laredo computed at 5 cents per 1000 cubic feet to be shown as an operating expense, in lieu of all testimony in respect to gas wells, leases, depletion allowances, reserves, etc. (R. 66).

On October 11, 1932, the hearing was recessed until November 9 (R. 9), and about October 21 (R. 238A) appellant, having acquired the physical properties and taken over the assets of both the distribution and pipe line companies, entered its appearance, adopted their pleadings, and thereafter became and was treated as the sole utility at interest (R. 11, 12). See appellees' petition (R. 1), appellant's answer (R. 31), and the stay orders in the State and Federal courts (R. 26-30).

As the pipe lines from the Jennings and Carolina-Texas fields to Laredo served several small communities and a few rural customers and part of the gas delivered at the Laredo city gate passed through the distribution system intermediate presssure loop and was used outside Laredo, joint expense and jointly used property were allocated as between service inside and outside Laredo, and only the figures applicable to service inside Laredo were shown in the exhibits. See descriptive headings (R. 200A, 201, 218).

introduced in evidence.[8] However, by showing separately each class of property appraised, i.e., gathering, transmission and distribution (R. 200-A, 203-208) and by motion for separate findings as to the value of each main element of property (R. 235), appellant attempted to forestall what it subsequently got, that is, a lump-sum over-all valuation figure from which it is impossible to tell whether any particular class of property was valued in the Commission's $885,000 total (R. 25) at the lowest figure shown by the evidence for that class of property, or at one-half or one-fourth of that lowest figure.

The State Judicial Procedure.

Unlike some other states, Texas has no special statute authorizing a suit in the State court for enforcement of a rate order accompanied by a stay pending final determination, such as is contemplated by the 1913 amendment to Section 266 of the Judicial Code; 37 Stat. 1013. Appellees alleged that this was such an enforcement suit, but that it was also an appeal under Article 6059, Revised Civil Statutes of Texas, 1925. (R. 6.)[9] Article 6059 provides that a gas company dissatisfied with a rate order of the Commission may file suit against the Commission in Travis County, Texas, setting forth its particular cause of objection. The statute requires

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[8]See the exhibits introduced at the Commission hearing (R. 195-196) and also the index to the printed record, Company's Exhibits pp. ix-x and City's Exhibits pp. x-xi.

[9]The theory that this suit was an enforcement suit under 28 U. S. C. 380 and an appeal under Article 6059 was upheld by the Court of Civil Appeals. See its opinion (R. 413, fol. 717). Article 6059 is quoted on pages 83-84, appellant's main brief.

the company to show by clear and satisfactory evidence that the order is unjust and unreasonable as to it, that the suit shall have precedence for trial and on appeal over suits of a different nature, and "shall be tried and determined as other civil causes in said court." Art. 6059, *supra*. The trial is *de novo* (R. 423) which the State law says does *not* mean:

> "a trial on appeal and on nothing but the record to correct errors, but does mean a trial of the entire case anew, hearing evidence, *whether additional or not.*" *Shultz & Bro. v. Lempert* (1881), 55 Tex. 273, 277.

And it has been held recently that:

> "any controverted factual grounds on which such order was predicated, would undoubtedly be matters for jury determination. But * * * the effect of such order * * * is clearly * * * a question of law for the court to determine; not one for submission to the jury." *Humble Oil & Refining Co. v. Railroad Comm.* (1936), not officially reported, 94 S. W. (2d) 1197, 1199, writ refused.

With a view to trial and determination as in other civil cases, appellant pleaded (R. 31-43) and proved (R. 65-195) the particular local facts it relied on to establish the constitutional invalidity of the Commission's rate order. *Appellant did not get such a trial and determination.* Appellant's claim that it was denied the rudiments of a fair trial is not directed to a trial *in accordance with state law,* but to trial contrary both to the state law of civil trials and to the rules declared by this Court for deciding confiscation in public utility rate cases.

Summary of the State Law Governing the Trial and Determination of Civil Cases.

Such cases are tried without regard to distinction between law and equity, the district court being the trial court of general jurisdiction.[10] The right to have all questions of fact decided by a jury is guaranteed by the State Constitution.[11] The State statutes insure separate findings on each material issue of fact, when requested by any party, both in jury trials[12] and where a jury is waived and the trial is to the court.[13] In jury trials, such findings are obtained by means of a charge consisting of definitions and separate interrogatories, each interrogatory embodying a single material question of disputed fact and to be answered separately by the jury,[14] submission in this manner being mandatory whenever requested.[15] Questions of fact not submitted by the charge when first exhibited to counsel may, before the charge is delivered to the jury, be called to the court's attention by preparing desired issues separately

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[10]Sec. 8, Art. V, Constitution of Texas; Prewitt v. Perry (1851), 6 Tex. 260, 262; Gibson v. Moore (1858), 22 Tex. 611, 615-616.

[11]Sec. 15, Art. I, Constitution of Texas.

[12]Arts. 2185, 2189, Rev. Civ. Stats. of Tex. 1925, quoted pp. 84-85, appellant's main brief.

[13]Art. 2208, Rev. Civ. Stats. of Tex. 1925, providing "Upon a trial by the court, the judge shall, at the request of either party, state in writing the conclusions of fact found by him separately from the conclusions of law."

[14]Arts. 2185, 2189, *supra*.

[15]Missouri, Kansas & Texas R'y Co. v. Improvement District (1927), 117 Tex. 34, 43; Fox v. Dallas Hotel Co. (1922), 111 Tex. 461, 475-476.

and in writing and requesting their submission. The court's notation "Refused" on any such issue constitutes the issue itself a bill of exception,[16] entitling the party requesting it to have failure to submit the question it embodies reviewed on appeal, and request in this manner prevents the question of fact presented by the issue from being taken as found in support of the verdict or judgment.[17] All facts must be found in the first

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[16]Art. 2186. *Special Charges.*—Either party may present to the judge such written instructions as he desires to be given to the jury; and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper. Such instructions shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. (Acts Tex. Legis., 1913, pp. 113 *et seq.*)

Art. 2188. *Refusal or Modification.*—When a special instruction is requested and the provisions of the law have been complied with and the trial judge refuses the same, he shall indorse thereon 'Refused,' and sign the same officially. If the trial judge modify a special charge, he shall indorse thereon 'Modified as follows: (stating in what particular he has modified the charge) and given, and exception allowed,' and sign the same officially. Such refused or modified charge when so indorsed shall constitute a bill of exceptions and it shall be conclusively presumed that the party asking said charge presented the same at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and the same shall entitle the party requesting such charge to have the action of the trial judge in refusing or modifying the same reviewed without preparing a formal bill of exception. (Acts Tex. Legis. 1917, pp. 389 *et seq.*)

Art. 2189. See p. 85, appellant's main brief.

[17]Art. 2190. *Submission of Issues.*—When the court submits a case upon special issues, he shall submit all the issues made by the pleadings and evidence. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, *an issue not submitted and not requested* is deemed as found by the court in such manner as to support the judgment if there is evidence to

instance in the trial court[18] and when the trial is to a jury, the trial judge is without power to resolve disputed facts.[19] When facts are relied upon to show the invalidity of a legislative act, conflicts in the testimony with respect to those facts must be resolved by the jury and the trial judge then applies the law to the facts as the jury has found them.[20]

Between the Supreme Court of Texas (which has jurisdiction only of questions of law),[21] and the trial

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[17]—*Continued*—
sustain such finding. A claim that the evidence was insufficient to warrant the submission of any issue may be complained of for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. (Acts 1st C. S., 1897, p. 15; Acts 1913, p. 113; Acts 1931, 42nd Leg., p. 120, ch. 78, Sec. 1).

[18]Choate v. San Antonio & Aransas Pass R'y Co. (1898), 91 Tex. 406, 409-410:

> "It is the province of the jury to determine questions of fact; but it is in the power of the trial judge to set aside the finding and to award a new trial. The Court of Civil Appeals has the same power upon appeal. But clearly the trial court cannot set aside the verdict of the jury and substitute its finding instead of the finding of a jury and render judgment accordingly. To say that the Court of Civil Appeals may do so when there is any conflict in the evidence, is to concede to that court a power over the facts greater than that possessed by the judge who heard the evidence, • • •. It had no power to make an original final determination of a question of fact. • • • It is contrary to the genius of our institutions as well as to the letter and spirit of every constitution ever adopted in this State, to suppose that it was ever intended to substitute the judgment of the appellate courts upon the facts of a case in place of that of the jury and to make the determination of these courts final."

[19]Stevens v. Karr (1930), 119 Tex. 479, 488, 489.

[20]Houston & Texas Central R'y Co. v. Dallas (1905), 98 Tex. 396, 417; Missouri, Kansas & Texas R'y Co. v. Improvement District (1927), 117 Tex. 34, 50-51.

[21]Sec. 3, Art. V, Constitution of Texas; Art. 1728, Rev. Civ. Stats. of Tex., 1925.

courts (which have exclusive jurisdiction to *find* the facts),[22] are the Courts of Civil Appeals. With exceptions immaterial here,[23] the intermediate appellate courts (Courts of Civil Appeals) are required by statute to make and file a conclusion of fact and of law in respect to each material error assigned.[24] A mere reading of the statute, without more, might give the impression that a Court of Civil Appeals is empowered, after a review of the evidence, to substitute its fact findings on disputed evidence for those in the trial court, or find the facts in the first instance where no finding was made below. Such is not the correct interpretation of the statute.[25] The review of the facts in the Court of Civil Appeals is to determine whether the findings in the trial court are supported by evidence and whether the evidence raises material questions of fact on which findings

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[22]See footnote 18, *supra*, p. 9.

[23]Findings are not required in cases as to which the Courts of Civil Appeals have final jurisdiction. Art. 1821, Rev. Civ. Stats. of Tex., 1925. The jurisdiction of the Courts of Civil Appeals was not final in this case, as the Railroad Commission of Texas was a party and the validity of an act legislative in character was involved. See sections 3 and 5, Art. 1728, *supra*.

[24]Art. 1873, Rev. Civ. Stats. of Tex., 1925. The pertinent parts of the statute are that the Court of Civil Appeals "shall make and file a conclusion of fact and law upon each material point assigned as error in that court. The evidence need not be stated, except when necessary to determine upon the correctness of some ruling of the court. Such findings of fact and conclusions of law may be included in the opinion of the court."

[25]A Court of Civil Appeals has no power to find the facts in respect to any issue as to which the testimony is conflicting. Patrick v. Smith (1896), 90 Tex. 267, 274; Choate v. San Antonio & Aransas Pass R'y Co. (1898), 91 Tex. 406, 409-410; Houston & Texas Central R. R. Co. v. Strycharski (1896), 92 Tex. 1, 9; Galveston, Harrisburg & San Antonio R'y Co. v. American Grocery Co. (1931), 122 Tex. 1, 13.

On original argument, the Court inquired as to the State judicial procedure in a number of respects. See Assignments 3 and 5 (R. 510-511), appellant's main brief, III pp. 37-47, and V pp. 50-54, and compare appellees' main brief, V, VI and VII, pp. 18-20, 44-47. The following section (pp. 11-15 hereof)—by illustrating what the State procedure would have been if the issue as to the inadequacy of the Commission's rate base had been treated below as a matter of substance—is intended as an aid in determining the *federal question, i.e.,* whether appellant has been afforded an adequate judicial review on the question of confiscation.

in the trial court were properly sought, but denied.[26] The rule is:

> "The province of determining questions of fact is in the trial court. The Court of Civil Appeals has the power to set aside its finding and remand the cause for a new trial. Where the evidence is without conflict, it may render judgment. But where there is any conflict in the evidence on a material issue, it has no authority to substitute its findings of fact for those of the trial court. Choate v. San Antonio & A. P. R'y Co., 91 Texas, 406." *Post v. State* (1914), 106 Tex. 500, 501.

See, also, *State v. Elza* (1918), 109 Tex. 256, 261. The conclusions and findings on the facts which a Court of Civil Appeals may make (Art. 1873, *supra*), are not to be confused with findings of fact in the usual sense.

Where the evidence will support only one legal conclusion, the trial court may instruct the jury to return a directed verdict, or the appellate court may render judgment. In determining whether a verdict should have been instructed or judgment rendered against a party, only the evidence and all inferences therefrom most favorable to that party are considered.[27]

This Case Was Not Tried and Determined as Required By State Law.

The denial of a trial in accordance with state law is illustrated by the issue as to the present fair value of

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[26] Art. 2190, footnote 17, pp. 8-9, *supra*.

[27] Joske v. Irvine (1898), 91 Tex. 574, 581-583; Wininger v. Ft. Worth & Denver City R'y Co. (1912), 105 Tex. 56, 58; Kirksey v. Southern Traction Co. (1919), 110 Tex. 190, 191.

appellant's property, found by the Commission to be $885,000. (R. 25.) Appellant averred that such value was in excess of $1,225,000 both in 1932 and 1933 (R. 39), and supported this claim by competent substantial proof. See appellant's main brief, pp. 37-43. The decisions of this Court recognize that one separate and distinct issue in confiscation cases is whether, by reason of the inadequacy of the base for the challenged rate, the result is confiscation (*Los Angeles Gas Corp. v. Railroad Commission,* 289 U. S. 287, 315-316), and that the utility is entitled to independent judicial judgment on this issue. *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 49-54. The court's charge (R. 380), when offered to counsel for inspection, did not permit fair value in either year to be found, and appellant moved forthwith for submission on special issues, which motion the trial judge overruled on the ground that his charge was a submission on special issues. (R. 372.) But see Articles 2185 and 2189, appellant's main brief, pp. 84-85, requiring the charge to "distinctly separate questions of law from questions of fact" and to "submit only controverted questions of fact" (Art. 2185) and that "special issues shall be submitted distinctly and separately" and "shall be answered by the jury separately." (Art. 2189.) Appellant then requested separately and in writing the issues on value it wished submitted, and all were refused. (R. 373-379.) There was nothing more that appellant could do, except preserve the error in another form by objections to the charge. See appellant's objections (R. 383-387), which were all overruled. (R. 387.)

The failure of the trial court to determine the issue

of value was duly assigned in the Court of Civil Appeals (R. 406-410, Assignments 11, *et seq.*). The Court of Civil Appeals should have reversed and remanded the case for a new trial because the issue of value had not been determined. Arts. 2189, 2190, *supra*, pages 8, 9. Instead, the Court held that the issue of value was merely a question of practice and refused to consider the assignments complaining of the failure to decide it. (R. 414.) See also appellant's motion for rehearing, paragraphs 31-32, 66-104, 151 (R. 440-441; 448-452), overruled without opinion. (R. 458.) No finding of value having been made in the trial court, the Court of Civil Appeals had no power to make a finding of fair value. *Choate v. San Antonio & Aransas Pass R'y Co.*, 91 Tex. 406, 409-410. The appellate court did not find that appellant's evidence was insufficient to raise an issue as to value, for then the holding would have been that, considering appellant's evidence alone and in its most favorable light, reasonable men could not find from that evidence that appellant's property had a present fair value of more than $885,000. See cases cited in footnote 27, *supra*, page 11; also *Irving v. Freeman* (1913), 106 Tex. 38, 40; *Cartwright v. Canode* (1914), 106 Tex. 502, 507. The issue of value could not have been taken as found in support of the verdict or judgment, both because it was a separate and distinct issue, and because its separate submission had been duly requested and refused. Arts. 2189, 2190, *supra*, pages 8, 9. The Court of Civil Appeals did what it said it did, and treated the issue of value as one of practice, not substance. (R. 414.)

The Court of Civil Appeals did not confine itself to

denying appellant a determination of the issue of value. The trial court had permitted appellees to introduce over appellant's objection (R. 298) a property appraisal of about $700,000. (R. 298-300, 229-230.) Appellees did not seek a jury finding on this testimony, nor did they except to the court's charge on that account. Concede, *arguendo,* that the Commission, having fixed a lower rate based on present fair value of $885,000 by order entered in June, 1933 (R. 26), having filed suit to enforce that order in July, 1933 (R. 1) and having made the order finding value at $885,000 its evidence at the trial (R. 64), could then attack the value that was the base for the very rate it was seeking to enforce, and thereby raise an issue of fact. But if all that be conceded, nevertheless the right to a finding that value was less than $885,000 was waived by not seeking such a finding from the jury. See *Ormsby v. Ratcliffe* (1928), 117 Tex. 242, 245-246, holding that separate and independent issues, not submitted or requested (Art. 2190, footnote 17, pages 8, 9, *supra*), are waived, and are not deemed to have been found in such manner as to support the judgment, the only issues deemed found in support of the judgment when not submitted or requested being subsidiary issues of fact related or supplemental to *findings* of the ultimate facts on which the judgment rests. Yet the Court of Civil Appeals based every calculation in respect to confiscation on $700,000. (R. 422, 425.) Appellees' inference that the Court found $700,000 as fair value cannot be supported. If appellees raised an issue as to whether fair value was $700,000, the jury was the only body in the whole State judicial system that could find it, the jury did not find

it, the appellees waived it, neither the trial judge nor the appellate courts had power to make such a finding, and the Court of Civil Appeals held that $700,000 was used because that was "the lowest valuation shown by the evidence." (R. 425.)

The trial of this case was directly opposed to the state law. As shown by Point V of appellant's main brief, pp. 50-54, the judgment below was based on a purported rule made by combining *phrases* from four federal decisions. The use of the phrase "resolving all doubts against appellant and using valuations pared down unsparingly" is an example. (R. 421, 425.) These words were taken from *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 174 and were quoted from Judge Hand's opinion. 267 Fed. 231, 261, 269. Judge Hand was passing on over 100 exceptions (267 Fed. at p. 232) taken to a master's report finding confiscation. He found that if he gave effect to all exceptions having any semblance of merit (thus resolving all doubts and paring down values), the result was still confiscation. Judge Hand used the short way of overruling 100 exceptions, but needless to say, he was not announcing a rule of constitutional law.

Effect of the Application of the Commission's Rate for 1932 and 1933.

The calculations in appellant's main brief showing the result of enforcing the Commission's order for 1932 and 1933 are recopied here as Tables 1 and 2. See pages 32-37 of said brief for the testimony supplying the figures used in Tables 1 and 2.

TABLE 1

(Copied from page 34, appellant's main brief)

	Year Ended December 31, 1932	Year Ended December 31, 1933
Operating revenues, with domestic gas sales computed at the 55 cent rate (R. 93)	$161,637.65	$138,256.85
Operating expenses, before depreciation reserve accrual	$125,001.40 (R. 69, 74)	$ 93,298.46 (R. 253)
	$ 36,636.25	$ 44,958.39
Depreciation reserve accrual; 3 per cent of $885,000, as found reasonable by the Commission (R. 21)	$ 26,550.00	$ 26,550.00
Net return	$ 10,086.25	$ 18,408.39
Rate of return on $885,000	1-1/10 per cent	2-1/10 per cent

TABLE 2

(Copied from pp. 36-37, appellant's main brief)

	Year Ended December 31, 1932	Year Ended December 31, 1933
Operating revenues after enforcement of the 55 cent rate (R. 93)	$161,637.65	$138,256.85
Operating expenses, as shown by appellees (R. 253)		$ 93,298.46
Undisputed by appellees (R. 93)	$125,001.40	
Net revenues before depreciation or income tax	$ 36,636.25	$ 44,958.39
Provision for depreciation as given by appellees' witness Elrod (R. 322-323, 330)	$ 25,000.00	$ 25,000.00
	$ 11,636.25 or about 1-7/10 per cent of $700,000	$ 19,958.39 or about 2-8/10 per cent of $700,000

Table 1 is calculated on the basis of the Commission's findings of fair value and depreciation allowance (R. 21, 25), because those findings (on which the Commission's rate was based) are the only *findings* of value and depreciation allowance which the State has provided in either the legislative or judicial stages of this proceeding. Table 2 is calculated on the basis of $700,000, using $25,000 for depreciation allowance, in order to show the result if the lowest figures testified to by any witness

are used. For the testimony showing (1) the lowest valuation figure, see plaintiffs' exhibit 12 "Total Value Depreciated—$698,047" (R. 330), and (2) the lowest depreciation allowance, see footnote 28 below.

Tables 1 and 2 show, on the testimony of operating revenues and expenses which appellees either gave or did not refute, the actual result of enforcing the Commission's order from its effective date until the record closed.[29] During 1932 and 1933, appellant's gross op-

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[28]Elrod's Calculation of Annual Depreciation Allowance Applied to His Final Appraisal:

The depreciation base given by Elrod was cost new (R. 322), treating land, leases and rights of way, materials and supplies, preliminary and organization expense and working cash as non-depreciable property (R. 330, fol. 566). His annual percentage was 3 per cent of cost new, after deducting non-depreciable items (R. 322):

New Cost (R. 330)		$901,675.00
Deduct (R. 330):		
Land, leases and rights of way	$10,475	
Materials and supplies	19,744	
Prelim. & Org. Expense	15,857	
Working Cash	9,788	
	$55,864	$ 55,864.00
Depreciation Base		$845,811.00
3 per cent of $845,811 is		$ 25,374.33

Before Elrod corrected plaintiffs' exhibit 9 (R. 298) by offering plaintiffs' exhibit 12 (R. 329), he calculated the depreciation base from plaintiffs' exhibit 9, and testified that the depreciation base, subject to the corrections still to be made, was $829,559 (R. 323). 3 per cent of $829,559 is $24,886.77.

[29]Under the State practice, the record closed April 24, 1934, the date judgment was entered (R. 389) and motion for new trial overruled (R. 401), and could not be enlarged thereafter. Stephens County v. McCammon, Inc. (1932), 122 Tex. 148, 154, holding that when "an appellate court is called upon to revise the ruling of a trial court it must do so upon the record before that court when such ruling was made." See also Brown v. Torrey (1858), 22 Tex. 55, 56, and Chrisman v. Graham

erating revenues at the higher prevailing rate yielded, after the same deductions for operating expenses and depreciation accrual as in Tables 1 and 2, only 3-6/10 per cent of $885,000 in the first of these years, and 4-4/10 per cent of that value in the second. See Table 3, footnote 30 below, and compare p. 68 and footnote 54, appellant's main brief.

The testimony before the Commission reveals the method by which the order was made, and has a material bearing on the confiscatory result of applying the order. January 1, 1932, was a focal point in this case. As of that date, the City made its rate ordinance effective (R. 8-9), the Commission acquired jurisdiction to review the ordinance and, if the ordinance were set

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29—*Continued*—
(1879), 51 Tex. 454, 456. And see footnote 39, pp. 49-50, appellant's main brief, for cases holding that the Commission lost jurisdiction while its order was in litigation and has no power to relieve from the effect of its order in respect to past transactions, regardless of whether its order is in litigation or not.

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TABLE 3

At the Prevailing 75 Cent Rate

	Year Ended Dec. 31, 1932 (R. 69)	Year Ended Dec. 31, 1933 (R. 253)
Op. Revs.	$183,777.41*	$158,822.62
Op. Exp.	125,001.40	93,298.46
Available for return and depreciation	58,776.01	65,524.16
Provision for depreciation (R. 21)	26,550.00	26,550.00
Available for return	32,226.01	38,974.16
Rate of return on $885,000 (R. 25)	3-6/10 per cent	4-4/10 per cent

*These revenues contain $8,790.20 (R. 88C) received for sales for public utility fuel (R. 69) to the Laredo electric plant of Central Power & Light Company.

aside, to substitute its order for the ordinance (R. 427-428), and appellant continued to charge the 75 cent rate under bond to refund such part of the product of that rate as was in excess of a reasonable return. (R. 411, 427.) The form of the Commission's order is unusual. There was no finding that the existing rate was excessive. The new rate schedule was promulgated with a retroactive effective date (January 1, 1932), and thus the refund provision of the order has been made operative from the first day of 1932 throughout the succeeding years. The Commission identified the testimony on which it calculated the 55 cent rate (R. 22), but did not set out these calculations. Had it done so, the face of its order would have shown that before 1932 began, the existing 75 cent rate was yielding less than 7 per cent return after 3 per cent for depreciation on $885,000. See Table 4, footnote 31, below.

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[31]

TABLE 4

Operations at the Prevailing Rates for the 12 Months Ended July 31, 1932.

Evidence at the Commission Hearing	*Company* (R. 201)	*City* (R. 218)	Without crediting power plant and refinery (non-recurring) revenues and gas expense *Appellees* (R. 291)
Op. Revs.	$194,524.57*	$194,458.09*	$179,059.79
Op. Exp.	127,414.62	114,149.62	109,973.16
Available for depreciation and return	67,109.95	80,308.47	69,086.63
Provision for depreciation (R. 21)	26,550.00	26,550.00	26,550.00

The Commission's calculation of the new rate necessarily would have disclosed that the reduction was based, not on the last year, but on the first three of four prior fiscal years, which years covered a period that began July 1, 1928, and ended June 30, 1931. See the Commission's opinion (R. 22) and compare city's exhibit L. (R. 218.) Rates which at the time they were reduced were not even yielding the return which the Commission found reasonable were lowered nevertheless because of earnings from July, 1928, to July, 1931.

The appellees offered testimony showing that for the five annual periods covered by plaintiffs' exhibit 8 (R. 253) net revenues at the existing rates before provision for depreciation or income tax, without crediting the revenues received from the local power plant and oil refinery (R. 291), would be as set forth in Table 5, footnote 32 below. Appellant has made a

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31—*Continued*—

Net available for return	40,559.95	53,758.47	42,536.63
Approximate rate of return on $885,000	4-1/2 per cent	6 per cent	4-8/10 per cent

*Total operating revenues of $194,524.57 and $194,458.09 include $15,398.30 (R. 88C) received from sales to the electric power plant, a source of income that permanently disappeared during 1932. (R. 88C, 104-113.)

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TABLE 5

At the Prevailing Rates, But Excluding Non-Recurring Revenues and Gas Expense (R. 291).

Twelve Months Ended	*Net Revenues Before Provision for Depreciation or Income Tax*
June, 1929	$104,148.59
June, 1930	100,257.84
June, 1931	94,206.71

mathematical average of these revenues and compared the average with the requirement for return and depreciation found by the Commission in its order. (R. 21, 25.) This comparison is made, even though at least the first two of the five years shown by Table 5 were a period of high values and boom prices.

In Table 6, footnote 33 below, appellant has separated the revenues shown by Table 5, using June, 1930, as the beginning of the depression, in view of the fact that the depression started with the stock market crash in the fall of 1929, was first felt in the financial and manufacturing centers, but did not manifest itself to any extent in raw-products states like Texas until the crop marketing season of 1930.

32—*Continued*—

July, 1932	69,086.63
Dec. 1933	65,469.76
Total	$433,169.53
Yearly average for 5-year period	86,633.91
Requirement for 3 per cent for depreciation and 7 per cent for return, computed on $885,000, as found by the Commission (R. 21, 25)	88,500.00
Deficiency—5-year average	$ 1,866.09

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TABLE 6

Showing All Revenues, Except Non-Recurring and Power Plant and Refinery Sales, and Including Domestic Revenues at the 75-Cent Rate

12 *Months Ended*	1920 *Boom Period* (R. 291)	*Depression Period* (R. 291)
June, 1929	$104,148.59	
June, 1930	100,257.84	
June, 1931		$ 94,206.71
July, 1932		69,086.63
Dec. 1933		65,469.76
Total	$204,406.43	$228,763.10

Appellees' Contentions:

Appellant hesitates to discuss or characterize appellees' contentions in so far as they may relate to the application of the Commission's rate, because it is not at all sure that it or anyone else can tell exactly what those contentions are. At the trial, appellees offered no testimony showing the application of the 55 cent rate for 1932, for 1933 or for any other period, and they do not show the application of the rate in their briefs here. Under Summary of Argument XX, p. 28 of their main brief, appellees say that appellant "has consistently used one or more or all of the following erroneous bases of calculation:", but the subsections that follow are as general as the statement just quoted, and appellees present no argument under Section XX, p. 28. The points which appellees argue are summarized in footnote 34 below, and appellant will confine its discussion to points which appellees thought sufficiently important to justify argument.

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[33]—*Continued*—

Yearly average	$102,203.22	$ 76,254.36
Requirement for 3 per cent for depreciation and 7 per cent for return on $885,000	88,500.00	88,500.00
Excess	$ 13,703.22	
Deficiency		$ 12,245.64

[34]The Index to appellees' main brief shows argument on the following points (where the argument is said to cover several related points, the first point is stated, and the others shown only by number):

		PAGE
I	No lack of notice or hearing claimed	43-44
V	No impossible burden placed on the Company. Also VI and VII	44-47

The points argued by appellees, contrasted with those on which they present no argument, constitute an implied admission that the testimony shows the 55 cent rate confiscatory for 1932 and 1933. Confiscatory returns for these two years, however, are claimed to be "immaterial" (XIX, footnote 34, *supra*, pp. 23-24), because of appellees' *hypothesis* of excess net earnings in later years as an offset to the confiscation shown in this record.

In arguing the effect of improved business conditions on "Probable Future Revenues" (footnote 34, *supra*, pp. 23-24), appellees ignore every factor except gross revenues. They do not mention the concomitant higher property values and construction costs, the increased payrolls and cost of operating supplies, the sharp rise in rates of taxation and the new taxes and levies which business has not known before.[35] The *extent* of the presumptive increase in each of these factors, the *ratio* of gross revenues to operating expense, the *ratio* of net revenues to property value, *after the presumed increase*

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[34]—*Continued*—

VIII	No findings of fact by Commission or reviewing courts required by statute, rule or due process. Also IX and X	47-53
XIII	Under actual test of 55c rate increased consumption and net revenues definitely shown probable in record	53-63
XIX	Immaterial that refunds ordered for period during which revenues below average	63-66
A	Rate Base	67-92
B	Operating Expenses	92-108
D	Probable Future Revenues	53-63 and 108-110

[35]The generally higher prevailing values and operating costs are themselves matters of judicial knowledge, while increase in gross revenues is an inference from judicial knowledge of improved business conditions.

in each factor and as they exist in respect to appellant's gas operations for Laredo, Texas, are not matters which a court can judicially know, but which require concrete proof of the specific facts as the basis for its judgment. See *Ohio Bell Telephone Co. v. Commission,* 301 U. S. 292, 300-302.

In so far as appellees' claim of "Probable Future Revenues" is based on an assumption of increased use at the 55 cent rate, it will be recalled that the Commission's rate was estimated on the average revenues of four prior years, which average included approximately $58,000 per year received for gas sold as fuel to a local power plant and an oil refinery (R. 37, 87, 88C, 89-91). These power plant and refinery revenues were not the product of the domestic rate, and they cannot be brought back by changing that or any other gas rate. The appearance of these revenues in the operating statements used for rate purposes was a fortuity (the fact that these plants happened to be inside, rather than outside, the city limits). The disappearance of the power plant revenues from Laredo operating statements is due to a recognized advance in the art, *i. e.,* central station service through interconnected high voltage lines instead of local plants (R. 104-109). The oil refinery revenues are gone—not because of the depression, as this company's losses before 1931 made it insolvent (R. 110)—but because the refinery could not support itself in an isolated local market handling the low gasoline-content crude oil of that area, and could not compete for other markets because of the distance to those markets (R. 109-110).

The Commission's order reduces the price of a serv-

ice the citizens of Laredo have been accustomed to use for over 20 years (R. 622). The statistics showing the number of patrons of the several utilities in Laredo support the conclusion that, at the 75 cent gas rate, there are 400 or 500 families that have gas in their homes, but no running water; 1600 or 1700 families having gas, but no electric lights; and over 2000 that have gas, but no telephones (R. 123-124). See appellant's main brief, footnote 56, p. 70. This would not be so if the 75 cent rate prevented a full enjoyment of appellant's service. The presumption is that electric rates in Laredo are reasonable, yet there were only about 10 electric ranges, one electric water heater, and very few electric space heaters in that City (R. 123). The houses in Laredo are customarily built without chimneys (R. 626), and in 1933, the annual gas bill per domestic consumer was $26.69 (R. 347), or slightly over 7 cents per day, for cooking, water heating and space heating. These three uses are necessities in the present day household, and when gas burning equipment is once installed, appliances burning other fuels are discarded, and gas is used for all the household fuel requirements. For example, a gas range and a wood or coal cook stove are rarely seen side by side in the same kitchen.

The influence of price on the use of gas is not to be confused with the price influence in the case of electricity, for while electric lights are a household necessity, many other home appliances requiring electric energy are still in the semi-luxury, luxury, or novelty stage, where a low electric rate will help sell the appliance and result in an increased use of electricity. These are fair inferences from the testimony or matters

of common knowledge. And for the effect of reduced gas rates on revenues see footnote 36.

Appellant will not discuss Rate Base[37] (footnote 34, *supra*, pp. 23-24), but appellees' statements as to operating expenses amount to a claim that the expenses were padded, and that information was withheld from appellees' accountant Lewis, with the result that even his operating expense figures are too high. Appellees do not deny that total operating expenses for the year ended December 31, 1932, were $125,001.40; or that this figure is the only evidence of operating expenses for that year, nor do they deny that by using $93,298.46, appellant has based its calculations on the lowest amount for 1933 operating expenses shown by any testimony in this case. But by listing and arguing certain kinds of expenses, without identifying them by amount, year in which incurred, class, or account,[38] appellees

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[36] See footnote 56, page 71, appellant's main brief, and compare appellees' claim that Amarillo, which is in Potter County, Texas, has no fuel oil nearby (their brief, pp. 54-55) with the petroleum production figures of the Amarillo or Panhandle Field, particularly the Borger Field, in the County adjoining Potter County, as reported in Federal Trade Commission, "Panhandle Crude Petroleum" Washington, U. S. Government Printing Office, 1928; "Petroleum Investigation," Hearings before a Subcommittee of the Committee on Interstate and Foreign Affairs, Washington, U. S. Government Printing Office, 1934, Part 3, p. 1834.

[37] Appellant does not know what more favorable rate base it could use than the base on which the rate was made and the lowest valuation figure given by any witness.

[38] Appellant's books were kept in the regular course of business according to the uniform classification of accounts of the National Association of Railroad and Utility Commissioners and as approved by the American Gas Association, were audited annually by auditors in no way connected with appellant and were the basis on which it accounted to all governmental agencies. (R. 67-68.)

seek to raise a doubt about operating expenses without furnishing any means whatever of resolving the doubt or weighing its effect. See appellees' main brief, pp. 93-108.

Proof that appellant has used operating expense figures most favorable to appellees is in the record. Its exposition is tedious. Appellees' accountant Lewis was employed by the city, was practically without previous experience in proceedings of this kind, and his testimony was not supported by any member of the Commission accounting staff.[39] Appellees were given free access to all appellant's records and fully availed themselves of this opportunity.[40]

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[39]Lewis was licensed as a certified public accountant in 1927 and graduated from the School of Business Administration of the University of Texas in June, 1928. (R. 1284.) His only previous connection with public utility records for rate purposes was through employment, jointly with another firm of accountants, by an engineering firm engaged on behalf of the Railroad Commission in an investigation of the Lone Star Gas Company of Dallas, Texas. (R. 723-724.) Kinney, appellees' only other accounting witness, was senior accountant employed by the same firm that employed Lewis. (R. 725.) Kinney and Lewis divided the work between them, Kinney covering the period prior to April, 1928, Lewis, 1928 and subsequent years. (R. 725.) Much of the work was not pertinent to this inquiry. See plaintiffs' Exhibit 4 (R. 1110), which was not conformed to the unit for rate making; plaintiffs' Exhibit 5 (R. 1111-1112), showing earning statements for each year from January 1, 1911.

[40]Lewis and several assistants spent between 8 and 9 months examining the records of appellant and all its predecessor companies. (R. 724-725.) Lewis testified that he was given "the free run of the books of the company," and "I was never refused any records that I thought were there. There were some things we could not find in those older records, but everything that was available, I am sure was made available to me." (R. 814.) Kinney testified to a like degree of cooperation. (R. 787-788.)

Appellant reported total operating expenses for 1933 to be $119,821.04 (R. 79), Lewis reported the same total to be $93,298.46 (R. 253) and his Exhibit furnished no clue to the discrepancy. Lewis was asked on cross-examination to compare appellant's 1933 statement with his and explain each difference and the amount. When this testimony was completed, it appeared that in no instance had appellant included operating expenses not actually incurred in serving Laredo and recorded on its books in the regular course of business. There was no suggestion of fraud, bad faith, or improvidence. The discrepancy resulted solely from the failure of Lewis to include all operating costs in the total. The comparison thus made is summarized in Table 7 below:

TABLE 7

Operating Expenses for the Year Ended December 31, 1933

Class of Expense	*Defendant's Exhibit* 3 (R. 79-83)	*Expenses Not Reported in Plaintiffs' Exhibit* 8	*Expenses Included in Plaintiffs' Exhibit* 8 (R. 253)
Production	$ 21,111.61		$ 14,997.10
Carolina-Tex Gathering Charge		$ 3,422.53 (R. 275)	
Reduction in Stipulated Well Head Price		2,642.27 (R. 275)	
Transmission	10,131.28		2,511.69
Pipe Line Rentals		2,352.90 (R. 805)	1,645.39

Operations and Maintenance Expense		2,099.50 (R. 806)	
Distribution	13,978.32		10,814.78
			4,609.09
Utilization	7.91		
Customers	14,136.54		14,145.74
New Business	6,077.61		2,805.19
		2,768.24 (R. 277)	
General	39,456.00		27,876.42
Rate Case		3,170.48 (R. 278-279)	
Legal		4,212.05 (R. 278-279)	
Supervision Fees		2,479.13 (R. 278-279)	
Taxes	14,921.77		13,893.06
Total	$119,821.04	$ 23,147.10	$ 93,298.46

1933 Operating Expenses Not Reported Or Included By Lewis in Plaintiffs' Exhibit 8 (R. 253)

Production:

Carolina-Texas Field Gathering Charge—$3,422.53
(Appellees' main brief, XXVI-B, 1, pp. 93-94)

The Carolina-Texas gathering system was not included in the inventory or appraisals. (R. 23, 157, 321.) This gathering system was located in the central and north part of the field, and has been rented at a charge of 1 cent per MCF in 1929 by reason of well-failures in the south part of the field. (R. 119-121.) The Railroad Commission did not question the need for this charge, but allowed it at only 1/2 cent per MCF, basing the re-

duction on a calculation which assumed, contrary to the facts (R. 227-228), that for a 5-year period (what 5 years is not shown) all gas for Laredo had been gathered in the north and central parts of the field through this gathering system. (R. 23.) The gathering system was owned by an affiliated company, and at the trial appellant introduced special proof of the circumstances under which it was rented, and proved that, applying the Commission's own method of calculation, the charge was reasonable. (R. 113-121, 129-131.) Lewis omitted all rentals paid for the use of this gathering system in 1933, amounting to $3,422.53. (R. 275, 286-287.)[41]

Reduction of Stipulated Well-Head Price—$2,642.27
(Appellees' main brief XXVI, 9, pp. 105-106)

Contrary to the stipulation entered by the parties and accepted by the Commission at the hearing before it (R. 11, 66), Lewis computed gas at a well-head price of 4.257 cents, instead of 5 cents, per MCF for 1933 (R. 275), testifying that 4.257 cents was the average price paid to the well owners during that year. (R. 843.) Repudiation of the stipulation was only as to 1933, as 5 cents per MCF was used by appellees in show-

[41]Lewis gave as his reason for omitting the charge that if the pipe line from Jennings Field and thence to Monterrey had not been built, and if the Jennings field had been held solely for Laredo, it would not have been necessary to get gas for Laredo in the north and central parts of the Carolina-Texas Field; that in some instances, gas had been billed at 8 cents per MCF., plus 1 cent gathering charge, and that the gathering system rental contract, while it required the lessor to maintain the gathering lines and extend them to other wells as needed, required appellant to pay the cost of operating the lines. (R. 757-761.)

ing the operating expenses of all other years. (R. 261-262.) Appellant proved that the price paid the well-owner did not include measurement, geological, land and lease, chemical, production accounting, or administration costs incurred by appellant in producing those wells (R. 101-102), or the cost of carrying reserves, which were production costs in addition to and added about 25 per cent to the bare well-head price (R. 361), and this testimony was undisputed. The difference between gas at 5 cents (to cover all production expense) and the bare purchase price used by Lewis amounted to $2642.27. (R. 275.)

Transmission:

Pipe-Line Rentals—$2352.90

(Appellees' main brief XXVI, B, 4, pp. 95-97.)

This was the pro rata part of the rental paid Southern Gas Company, an affiliate, for using the pipe line extending from Jennings Junction toward Jim Hogg Field, to which pipe line the East Jennings gathering system was tied. See map, R. 216B, 1405. This line delivered gas to the Jennings-Roma line regularly, and was used to supplement the supply for Laredo (R. 227-228) on account of the low pressures in West Jennings. (R. 649-650.) This rental contract was canceled and rental payments ceased about November, 1933. Appellant did not offer special proof in support of this rental. See Ivy's testimony in respect to the fields expected to supply Laredo. (R. 253.) The contract was made and performed in good faith, and appellees' reckless statements in regard to it are not sup-

ported by evidence. The line, so far as Laredo was concerned, was for stand-by and emergency use.

Operations and Maintenance Expense—$2099.50
(Appellees' main brief XXVI, B, 3, p. 95)

The pipe lines from Carolina-Texas and Jennings Fields to Laredo were in the same pipe line district with the pipe line from Jennings Junction to Roma, and all lines were operated and maintained by the same forces. Lewis divided all transmission and maintenance expense between the pipe lines to Laredo and the Jennings Roma line on the basis of the respective volumes of gas carried by each line, while appellant prorated such of these expenses as could not be traced to a particular line on the basis of lineal and 3-inch equivalent[42] miles of pipe, each given equal weight. The pipe line to Roma was 12 inches in diameter, the Laredo lines had sections 6, 8, 10 and 12 inches in diameter. See map (R. 216B). The Roma line was laid in 1930, the Laredo lines in 1916 and 1922-1933. See appellant's main brief, p. 9. Pipe line maintenance costs and operations costs are not a function of the volume of gas handled, being related to size, duration in service, length and other similar factors. The method employed by Lewis charged the Roma line with over three times as much maintenance and operations expense as the older Laredo lines on a 3-inch equiva-

[42]The method generally used to reduce gas pipe of different sizes to a common denominator, for example, one lineal mile of pipe 6 inches in diameter is two miles of 3-inch equivalent pipe.

lent basis. See footnote 43, below. This was wholly arbitrary, resulting in the omission of $1195.91 of operations and $903.59 of maintenance expense or a total of $2099.50 incurred in serving Laredo. (R. 806.)

New Business:

(Not argued by appellees)

Lewis omitted 1933 new business expense amounting to $2,768.24 (R. 277), on the theory that this expense ought to be incurred or charged only in the case of new gas properties and not in Laredo, where the business was well developed (R. 289) and because of his erroneous belief that so-called "industrial engineering" (preliminary engineering done to demonstrate to industries using other fuels that their plants could be adapted to the use of gas) was done only for industries served directly by pipe lines. (R. 879.)

General Expense:

Rate Case Expense—$3170.48

(Not argued by appellees)

The Commission allowed this expense, to be amor-

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[43] TRANSMISSION OPERATIONS EXPENSE

	Roma Line (R. 888-889)	Laredo Line
Per lineal mile	$276.69	$41.87
Per mile of 3-inch equivalent pipe	69.52	19.79

TRANSMISSION MAINTENANCE EXPENSE

	Roma Line (R.889	Laredo Line
Per lineal mile	$191.44	$28.97
Per mile of 3-inch equivalent pipe	48.10	13.69

tized over 10 years. (R. 24.) Rate case expense shown by appellant for 1932 and 1933 amortized the part of such expense incurred through 1933 on a 10 year basis. (R. 367-368.) Lewis omitted all this expense[44] (R. 278-279) amounting to $3,170.48, and did not attempt to justify the elimination. (R. 282.)

Legal Expense—$4212.05
(Not argued by appellees)

Lewis eliminated all legal expense, mistaking it for rate case expense (R. 278-279),[45] and make no examination to determine the source or justification of the charges for legal services. (R. 280-282.)

Supervision and Consultation Fees—$2479.13.
(Appellees' main brief, XXVI, 5, pp. 98-99)

Appellant offered the required proof showing the character of services for which these fees were charged (R. 191-194) and the cost to Electric Bond and Share Company of rendering the services to appellant for which the fees were paid. (R. 195.) Lewis eliminated this expense. (R. 278-279.) See Lewis' testimony (R. 278-279) showing elimination of two such items, $411.55 and $1,828.31, totaling $2,479.13.

Other items argued by appellees are uncollectible bills

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[44]See Lewis' testimony showing elimination of valuation and regulatory commission expense, items of $440.66 and $411.55 (R. 278) and $1238.47 and $1079.80 (R. 279), totaling $3170.48.

[45]See Lewis' testimony showing elimination of law expense $619.33 and $296.25 (R. 278) and $1,745.19 and $1,551.28. (R. 279.)

(XXVI B, 5, pp. 99-101) which Lewis included in the sum of $1,940.75 (R. 270), and which he should have included, because appellant's books show total amounts billed customers (R. 273-274) and therefore *receipts* are less than billings by the amount of the uncollectibles (see *Florida Telephone Co. v. Commission*, 47 F. (2d) 467, 469) and donations, (XXVI B, 7, p. 101) which in 1933 totaled $138. (R. 278-279.) The rate case and legal expense and supervision fees omitted by Lewis total close to $10,000, and these items account for all but a very minor part of the difference between general expenses as shown by appellant and by Lewis. And there are a number of miscellaneous small differences, resulting mainly from the use of different allocation factors in conforming the testimony to the city borders as a rate unit.

If only the arbitrary and unauthorized eliminations discussed above are restored to 1933 operating expenses, then the change in Table 1 would be:

	1932	1933
Op. Revs. (R. 93)	$161,637.65	$138,256.85
Op. Exp. (R. 69)	125,001.40 (R.253)	93,298.46
	36,636.25	44,958.39
Provision for depreciation	26,550.00	26,550.00
	10,086.25	18,408.39
Restore Lewis' arbitrary eliminations		23,147.10
	Return 1-1/10 per cent on $885,000	Deficit of $4738.71

The Bond Given On Appeal to the Commission.

Appellant is at a loss to understand what question there can be as to the refund bond at this stage of the case. There was a question concerning the bond before the Court of Civil Appeals, but that question was only in respect to the power given the Commission by state statute.

The question arose in this way. Appellees undertook to introduce the bond generally before the jury and the trial court excluded it.[46] The judgment in the trial court declared the refund provision of the Commission's order invalid. (R. 390-391.) The Court of Civil Appeals based its action reforming the judgment below and enforcing the order from January 1, 1932, on the *power* of the Commission to make the rate it fixed effective as of any date after it had actually acquired jurisdiction. (R. 427-428.) Under this holding, the bond was immaterial, and the Court did not pass on the cross-assignment complaining of the exclusion. If the bond had been necessary to the judgment, the Court of Civil Appeals could not have treated the bond as in evidence, even though erroneously excluded, but was re-

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[46]The record showing the offer and exclusion of the bond is as follows (words in parenthesis ours):

"*Mr. Lange*: We offer this (meaning a certified copy of the bond filed by appellant with the Commission on its appeal from the Laredo ordinance) in evidence.

"*Mr. Coates*: To which defendant objects because—

"*The Court*: Is there any issue on that, that the Railroad Commission did not have jurisdiction?

"*Mr. Coates*: No, sir.

"*The Court*: The objection is sustained.

"*Mr. Lange*: Note our exception. That is all, Mr. Petet.

"*Mr. Coates*: No cross-examination." (R. 538-539.)

quired to reverse and remand the case for a new trial. *Eidson v. Reeder* (1907), 101 Tex. 202, 204-205; *Abbott Oil Co. v. San Antonio Brewing Association* (1911), 104 Tex. 574, 575-576.[47]

Appellant raises no question as to the power of the Commission to require a bond for refunds or as to when the Commission may make its order effective. What appellant seeks is the protection of the Constitution against the confiscatory effect of this order. The Commission cannot so condition the privilege of securing suspension of a rate ordinance as to secure a *valid* consent from appellant to surrender its constitutional rights (*United States v. Chicago, Milwaukee, etc. R. Co.*, 282 U. S. 311, 328-329), nor can it prevent appellant from securing an *adequate* judicial review of the validity of its order. *Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota*, 134 U. S. 418, 459-460; *Chesapeake & Ohio R'y Co. v. Conley*, 230 U. S. 513, 521-522.

Respectfully submitted,

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant.

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[47]In the Abbott Oil Company case, *supra*, the suit was to enforce a contract secured as to performance by a bond, but the bond was excluded from evidence. The Supreme Court of Texas said that, upon holding the exclusion of the bond erroneous, the appellate court could not construe the bond and base judgment thereon, but was required to reverse and remand for a new trial.

ADDENDA

Appellees' assertions, made on pages 7-9 of their second supplemental brief, and repeated in the Index to that brief, that appellant (pp. 7-8) "deliberately refused" to divulge its general expense figure for 1933, and that this resulted in their (p. 8) "entire inability" to obtain the necessary information on general expense for this year, are baseless. See cross-examination of Womack by appellees (R. 567-568), and note that Womack gave there the general expense figure he understood appellees to call for, and that when appellees pursued the inquiry further, the court directed them to go on to other matters and call Womack back later (R. 568). When Womack was recalled to the stand near the end of the trial, appellees did not ask him for this figure (R. 1080-1084; see 813). Appellees refer to page 811 of the record, where Lewis testified that he could not reconcile his 1933 general expense figure (R. 253) *exactly* with appellant's (R. 79), but could *approximately* (R. 811), and proceeded to make this reconciliation (R. 812-813), giving all differences in general expense except $147.00 for transmission properties and $47.00 for distribution properties (R. 813, fol. 966). It is clear from the record that the only reason why appellees wanted the general expense figure was to reconcile differences *exactly* (R. 811-813).

Appellant promptly cross-examined Lewis to determine whether there was or would be any claim that information was withheld (R. 814). Lewis testified that all information had been furnished. Appellees' counsel stated and the court ruled that no such claim was being made, directly or by implication (R. 814, fol. 967). See also footnotes 39 and 40, p. 28, and "General Expense," pp. 34-36, appellant's supplemental brief on reargument, and Article 6052 of the Texas Statutes, p. 82, appellant's main brief.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. [redacted] 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

versus

STATE OF TEXAS, ET AL.,
Appellees

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' MOTION TO DISMISS

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